NO. 80-2049

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

GEORGE A. RALSTON, WARDEN, PETITIONER

v.

JOHN CARROLL ROBINSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR EXPEDITED CONSIDERATION OF THE
PETITION FOR A WRIT OF CERTIORARI

Shortly before the petition for a writ of certiorari in this case was due to be filed, certain facts came to our attention which, we believe, warrant the Court's expediting its consideration of the petition and acting on it before the end of this Term.

1. The issue in this case is whether an offender convicted of a crime while serving a sentence under the Youth Corrections Act (YCA), 18 U.S.C. 5005, et seq., and sentenced to a consecutive term of imprisonment as an adult, must be treated as a YCA offender for the remainder of his YCA sentence. The respondent was sentenced in 1974 to a ten-year term of imprisonment under YCA. While serving that term, he was convicted of assaulting a federal correctional officer, in

violation of 18 U.S.C. 111; the sentencing judge explicitly rejected sentencing under the YCA and instead imposed on respondent a term of five and one-half years' imprisonment as an adult. The judge specified that this sentence was to be served consecutively to the YCA term. Respondent subsequently pleaded guilty to another charge of assaulting a federal officer and was sentenced to another consecutive adult term of imprisonment. After respondent petitioned for a writ of habeas corpus, the United States District Court for the Southern District of Illinois and the United States Court of Appeals for the Seventh Circuit held that respondent had to be treated as a YCA offender for the remainder of his YCA term.

We have petitioned for a writ of certiorari to review this decision. We have learned, however, that under 18 U.S.C. 5017(d) respondent must be conditionally released from his YCA sentence on January 9, 1982. At that time he will begin serving his first adult sentence. We understand that respondent's conditional release date cannot be postponed unless he escapes from custody. Consequently, it appears that this case will become moot on January 9, 1982. 1/ If the Court considers our

1/ The Parole Commission would have authority to revoke respondent's conditional release, under certain circumstances, but such a revocation would not interrupt the adult sentence. Consequently, if the conditional release were revoked, respondent would be serving his YCA sentence and his adult sentence concurrently. Whether respondent would have to be treated as a YCA offender under those circumstances is a substantially different issue from that presented in this case, and one on which no court of appeals has ruled against the government. In any event, since revocation of respondent's conditional release could not materially affect his term or conditions of confinement, it seems virtually certain that this would not be done even were respondent to violate the conditions of his

[FOOTNOTE CONTINUED ON NEXT PAGE]

petition for certiorari in the normal course, it will not be acted upon until October 1981. If the petition were granted at that time, even expedited briefing and argument would be unlikely to allow the Court sufficient time to decide the case prior to January 9, 1982. By granting the instant motion to expedite consideration of the petition, the Court can, if it also elects to grant the petition, set this case for argument in October and decide it before it becomes moot. 2/

2. We petitioned for certiorari not only because we believe the decision of the court below is inconsistent with the central purposes of the YCA, but also because of a square conflict among the circuits and because of the peculiar significance of a decision by the Seventh Circuit on the issue presented in this case. The Seventh Circuit acknowledged that its decision is inconsistent with Thompson v. Carlson, 624 F.2d 415 (3d. Cir. 1980), where the Third Circuit held that a YCA offender who received a consecutive adult sentence of life imprisonment, from a judge who explicitly found that he would not benefit from YCA treatment, could be treated as an adult for the remainder of his

"release" from his YCA sentence.

At this time we also see no basis for asserting that the issue presented here would characteristically evade review and therefore come within the exception to the mootness doctrine specified in Southern Pacific Terminal Corp. v. I.C.C., 219 U.S. 498, 575 (1911), and its progeny. See Weinstein v. Bradford, 423 U.S. 147 (1975).

2/ Had we learned of the prospective mootness of this case earlier, we would have expedited authorization and preparation of the petition so that it could have been considered in normal course before the summer recess. Unfortunately, we did not become aware of the problem and ascertain respondent's mandatory release date until May 28, 1981.

YCA sentence. The Seventh Circuit's decision conflicts even more extensively with Outing v. Bell, 632 F.2d 1144 (4th. Cir. 1980), cert. denied, No. 80-6605 (Mar. 23, 1981); there a YCA offender received a consecutive adult sentence, and the Fourth Circuit, not relying on the second sentencing judge's finding that the offender would not benefit from YCA treatment, specifically upheld the Bureau of Prisons policy of treating such offenders as adults. Indeed, the Fourth Circuit said that allowing such an offender to retain his YCA status would be "contrary to the purposes of the Act" (632 F.2d at 1146).

We have explained in our petition why we believe that this conflict among the circuits requires resolution by this Court. Under some circumstances, the likelihood that a case would become moot before it could be decided by this Court in normal course would lead us to forgo petitioning and await a subsequent case in which the issue could be determined free of mootness problems. In the particular circumstances here, however, we do not believe that this is an appropriate course of action, for several reasons.

First, although one can confidently predict further litigation of this issue by prisoners similarly situated to respondent, there is currently no case pending that is ripe for review by this Court. 3/ It thus seems quite possible that failure to hear the instant case would postpone authoritative resolution of the issue beyond the October 1981 Term.

More important, special problems confront the Bureau of Prisons because the adverse decision is from the Seventh Circuit. The federal penitentiary at Marion, Illinois, which is within the Seventh Circuit, is the only one in the country with a level 6 security rating. For certain particularly dangerous, escape-prone, or violent inmates, it represents the only appropriate and sufficiently secure facility for their incarceration. This is not a class action; nevertheless, if the decision of the Seventh Circuit in this case is permitted to become final, substantial questions will arise as to the propriety of retaining any YCA/adult inmates in or transferring such prisoners to Marion prior to resolution of the conflict by this Court. Indeed, although we disagree with the Third Circuit's ruling in Micklus v. Carlson, 632 F.2d 227 (1980), the Bureau of Prisons is understandably concerned about the prospect

3/ King v. Kenney, No. 80-2777 (7th Cir.), now pending in the Seventh Circuit, involves a YCA offender who received a consecutive adult sentence from a state court; it thus presents a similar but somewhat different question from this case. An affirmance of the district court's ruling against the government in King would appear to conflict with the law of the Fourth Circuit but, since the state court made no finding about whether the offender would benefit from YCA treatment, would not conflict with the Third Circuit's decision in Thompson. We understand that King will be conditionally released from his YCA sentence to his consecutive adult term no later than July 23, 1982.

of protracted civil damage actions raised by that decision.

As we note in the petition, there are at present approximately 175 federal prisoners serving YCA sentences who are also subject to concurrent or consecutive adult sentences. In accordance with the Bureau's present policy, all of these prisoners have been removed from YCA programs and classified as adult prisoners upon imposition of the adult sentence. Within the Seventh Circuit there is now one other prisoner at Marion and nine at Terre Haute, Indiana (one of only four level 5 institutions receiving sentenced inmates) who are similarly situated to respondent and who would apparently be entitled to transfer out of those institutions to less secure YCA facilities under the authority of the Seventh Circuit's decision in the instant case.

In light of the foregoing considerations, it is our conclusion that it would not be appropriate for the government to leave the present decision unchallenged and the inter-circuit conflict it creates unresolved, while awaiting some subsequent opportunity to present the issue to this Court. If the Court does not find it appropriate to grant the instant motion to expedite, we would be willing, if counsel for respondent would also agree to do so, to prepare briefs in the case over the summer. Then, if the Court were to grant the petition in October, the briefs could be promptly filed and the case could perhaps be set for argument during the November session. While this course of action would still leave open the possiblity that the Court could decide the instant case before it becomes moot,

it would allow considerably less opportunity for deliberation and preparation of an opinion than would be possible with expedited consideration of the petition prior to the summer recess. 4/

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should grant expedited consideration of the petition for a writ of certiorari in this case.

WADE H. McCREE, JR.
Solicitor General

JUNE 1981

4/ If the Court were to grant the petition in October but not provide expedited argument, we would expect to request the Court to vacate the judgment of the court of appeals when the case becomes moot in January 1982. See United States v. Munsingwear, 340 U.S. 36, 39 (1950). While this would relieve the Bureau of Prisons of any direct consequences of the decision in the instant case, it seems likely that it would only postpone for a short while the need to have the issue resolved by this Court. In view of footnote 6 of the court of appeals' opinion (Pet. App. 6a), indicating that the opinion had been internally circulated prior to its issuance, we are not optimistic about our prospects of persuading another panel of the Seventh Circuit to reach a different result in subsequent cases presenting this issue.